IN THE

Supreme Court of the United States.

October Term, 1901.

No. 303.

WILLIAM R. TUCKER, VICE-COUNSUL OF RUSSIA,
Petitioner,

v.

THE UNITED STATES, *Ex Rel.* LEO ALEXANDROFF.

Brief for Respondent.

COUNTER-STATEMENT OF FACTS.

The statement of facts in the petitioner's brief, gives a very one-sided view of the case. The chief vice of the statement is that it assumes that there was a crew, which is the principal question in the case. It is true, that in the testimony here and there the word "crew" is used, but only as a convenient term to collectively describe the men sent over by the Russian Government. That this is the case may be seen from the statement of counsel for the relator below (folio 17, record) where counsel for the relator stated: "This man came here with a company of men, but we do not state that he came here as a part of the crew of the 'Variag,'" the purpose of this statement being to admit that he came here with a number of other men, but to deny that there was any organization of them whatever as a crew or in any other way.

For a fair and succinct statement, the Court is referred to the findings of the learned District Judge (p. 31, Record), which are equivalent to the findings of a jury. But a few additional facts are called to the Court's attention.

At the time Alexandroff came to Philadelphia, the "Variag" was an unfinished, inchoate thing on the stocks, which would, in the eye of the law, be probably not considered a ship at all. Since that time, up to the time of the alleged desertion, the Russian government had not done anything to in any way indicate any further control over the ship than it had when the party of men arrived in Philadelphia. No change whatever had been made in the status of the ship. It remained in the builder's hands. Many men were, at the time of the desertion, still working on the ship (p. 10, Record). The only trial trip was under the direction of the superintending engineer of the Cramp Company (p. 11, Record). The Russian government had not yet expressed its satisfaction with the ship (p. 10, Record); or accepted it, and it might still be rejected (p. 12, Record, and see Contract, p. 17). The Russian flag had never been raised on the ship, nor had the ship ever been commissioned as a ship of the Russian navy, nor had the Russian government or a Russian crew ever had actual custody or possession of the ship. Nor had there been any actual indentification of Alexandroff with the ship as a member of its crew.

The fact is significant that the Russian captain was in court (p. 16, Record), but was not called to controvert respondent's case. No claim was made that the ship had been commissioned, nor did the captain or anybody else produce any official documents or papers attesting the ship or the captain's commission. It is submitted, that a fair interpretation of all the facts is, that **there was merely an inchoate intention upon the part of the Russian government that when and if the ship should be accepted, then Alexandroff should become a member of the crew of the ship.**

An important fact upon the question of the jurisdiction of the United States Courts is that the Russian government,

through Vladimir Behr, duly entered its appearance in the District Court and in the Circuit Court of Appeals and took part in the case, and has, through its Vice-Consul, duly made its appearance in the Supreme Court, as the petitioner for *certiorari*.

The particular clauses of the contract betweeen the Cramp Company and the Russian government dwelt on in petitioner's brief give a manifestly unfair view of the instrument. The discussion of its provisions and effect is made below.

It is respectfully suggested, that the "brief for petitioner" does not present the various points in the case in their natural and logical sequence or order. There are many distinct questions at issue which require specific treatment, and this brief has been arranged with these ends in view.

Argument.

I. The important question in the case is—was the "Variag" at the time of the desertion a Russian ship of war and was the respondent a member of her crew?

a. A reference to Article 9 of the treaty of the United States with Russia of 1832 will show that the United States will assist the Russian government in the imprisonment and recovery "of the *deserters from the ships of war* and merchant vessels of their country." Similarly the Revised Statutes, Section 5280, provide for such arrests of a person who "Has deserted from a *vessel of any such government while in any port* of the United States" on proof, "That the person named belonged at the time of desertion to a *crew* of such *vessel*." It is clear, that the United States by this treaty merely intended to assist *Russian ships to recover their crews, when being in a port of the United States, the crews desert.* This is a protection which almost every civilized nation gives to

every other civilized nation; but it is to be confined strictly within the limits of the purpose. The United States has always been averse and has continually declined to make treaties for the return to other countries of *political offenders*, such as those who flee from *compulsory military* or *naval service*. See Treaty with Russia of 1887. And it is clear that the United States **did not agree with Russia to return deserters from the Russian navy, but only deserters from a vessel in a port of the United States**; that is to say, to prevent merely the hazard of a ship coming into a port of the United States and its seamen deserting.

Between these two things is a very wide distinction. Thus, if a member of the Russian navy should escape to the United States from his country or from a Russian ship not being in a a port of the United States, the United States could not and would not lend its aid to compel the fugitive's return. Or suppose that the Russian Government, *instead of sending this company of men to Philadelphia, had* merely detailed the same men out of the Russian navy and had directed them to remain in *St. Petersburg*, intending and stating that they should become the crew of the "Variag," when it should be completed in the port of Philadelphia, and supposing then, that before the ship had been accepted by the Russian Government, the respondent had fled from St. Petersburg and had come to the United States and had declined to become part of the crew of the "Variag," could it be contended that the man would be a deserter in such case under the treaty? Yet, the only difference between that case and the present one is that in the present case Alexandroff was sent to Philadelphia instead of to St. Petersburg; he no more became a part of the crew of the ship in the one case than in the other; he is simply a member of the Russian navy, who is **intended** by the Russian Government to become a part of the crew of the "Variag,' *when that shall be completed and accepted;* until that time he was merely a member of the *Russian navy*, he was not a member of a *crew of a Russian ship*, because the ship had never passed into the *actual custody* and *control* of the

Russian Government or been commissioned, and because no crew had been ever identified with it or organized upon it. Hence he could not be a deserter from it; he was merely a deserter from the Russian navy in both cases, and **the treaty does not provide for the return of deserters from the Russian navy.**

Without a treaty, there can, under no circumstances, be a return of deserters. Moore on Extradition, Sec. 408. Desertion from the army of another country is not an offense, unless under express conventional obligation. *Id.* It would follow from these principles that the right of the Russian Government is founded *strictly upon this treaty, and if it did not show authority in the plain language of the treaty* for the arrest and return of the respondent, he was entitled to his freedom. See U. S. *v* Rauscher; 119 U. S., 407, holding that all extradition depends upon treaty.

In line with this thought, see Moore on Extradition, Sec. 408, Note, where an opinion of Mr. Baird, Secretary of State, is given to the effect that where there are such treaties as the one in the present case, that does not afford any ground for arresting or punishing persons who induce and aid seamen to desert, because the treaty does not provide for that. Under these circumstances, it is contended that the treaty must be construed according to its *plain language*, and that only a deserter of an *actual Russian ship, a Russian ship in fact* in a port of the *United States is amenable under the treaty;* but that a deserter from the *Russian navy* not constituting any member of a *particular* crew of a *particular* ship is not amenable.

b. What effect has the contract between Russia and the Cramp Company? A great deal is made of this contract and it is argued by petitioner that this should control the question of whether or not this was a Russian ship. That contract shows *not* that the Cramp Company is the "agent" of the Russian Government, as suggested in the Circuit Court of Appeals by the petitioner, but that the Cramp Company are contractors to build and sell a

ship, and that during the building of the ship the Russian Government is to have certain rights for its protection. But there is nothihg which indicates any such relation as principal and agent, and the word is nowhere used. Does an agent buy materials on his own credit? Do agents or vendors "deliver" vessels? Do agents or vendors warrant and take the risk of the article supplied? It is simply a contract to build and to sell a ship with the provisions usual in the case of such a large and valuable object, that the buyer shall have certain rights over the subject matter.

But it is contended that Alexandroff's rights are *not concluded by this contract*, however binding it may be *between the Cramp Company and the Russian Government*, nor is the question a question of what the Russian Government *might* do under this contract so far as taking possession and exercising control of the ship is concerned. The question is, *what was in fact done, at the time of the alleged desertion, by the Russian Government to make of this a Russian ship of war?* In other words, the question is not whether as between the Cramp Company and the Russian Government, under the contract the Russian Government would have the right to claim property in the ship at the time of the alleged desertion, *but whether the ship was as a fact a Russian ship of War, whether the Russian Government had at that time, so taken possession of the ship and made it a part, a commissioned part, of the Russian navy, so as to make it a ship of war* under the Treaty. The Court is asked to note Article VIII, Sec. B. and Sec. E. of the contract which show that the Russian Government may *reject* the ship for various reasons, and that thereupon the payments made on account become repayable. The provision in Article X. that the vessel, whether finished or unfinished, and the materials, shall be the exclusive property of the Russian Ministry will undoubtedly, as between the Cramp Company and the Russian Government, give the Russian Government the property in said material, a kind of equitable title, under certain

conditions. But it cannot be said that this makes the ship a ship of war within the treaty.

Suppose that the contract provided that from the moment the loose materials for building the vessel were gathered, these materials should constitute a Russian ship of war, and suppose that while these materials were lying loosely in the shipbuilders' yard, the respondent deserted. Now, under the authorities, such mere materials do not constitute a ship. (The Eliza Ladd, 8 Fed. Cases 491.) Could it be contended with any reason that, because the contract had provided that these loose materials should constitute a ship, that that would make these loose materials a Russian ship of war within the treaty? Yet, if the contract is to control, this is the *reductio ad absurdum* to which such a proposition can be pressed.

And if the vessel be finished and the property of the Russian Ministry of Marine as against the Cramp Company, it is not a **ship of war** under the treaty until it *actually* has been received into the *Russian custody* as a part of the *Russian navy*. The treaty was not concluded to protect deserters from ships in the *custody of the Cramp Company*, but from *ships of war* of Russia. And it is submitted that the question is not what rights Russia *may have* under the contract with the Cramp Company, or what Russia *may do* under the contract, but whether *those rights have been exercised, and whether those things have been done which will make this ship in fact a ship of war of Russia.* But, if the contract is read further through Article X, and Article XII, it will be seen plainly that this apparent absolute right of property in the Russian government is really only an option, so that it *may* if it *desire*, take possession of the ship. Thus the ship is to be insured for the benefit of the Russian government. But why? "To cover and recoup the sum or sums which said government may have paid," etc. This instead of showing property in the Russian government really shows that the intention is to protect Russia upon its payments. But the whole thing is made plain by the closing provisions of Article XII. that notwithstanding all the provisions of the contract the ship shall, as

between the contractors and the Russian Ministry of Marine, stand and at all times be at the risk of the contractors until the said ship *has been accepted* by the Imperial Russian government, or it has *actually taken possession* thereof. Can any such ship by any possibility be said to be a part of the Russian navy, "*a ship of war*" under the treaty?

It is clear that notwithstanding the provision as to property, it is the contractor's ship in law and in fact until acceptance or actual taking possession by the Russian Government; and that the provision as to the property being in the Russian Ministry of Marine is in effect not intended to take the property out of the Cramp Company, but is merely intended to give the Russion government a *cantrol or option* over the ship as against the Cramp Company, if it should be called upon to exercise it against the Cramp Company.

Article XIII. is to the same effect; the contractors are to "*deliver*" the vessel equipped for sea into the charge of the persons appointed by the Imperial Russian Government to receive it in a certain time. If the ship is already the complete property of the Russian Government, why need it be delivered?

Similarly Articles XV. and XVIII. and XX. also speak of delivery. So article XVIII., Sec. 10, provides for the payment of the final ten per cent. of the purchase price, when the ship has had a successful *trial* trip and has been *turned over* to the Imperial Russian Government.

The last portion of Article XX. still further elucidates the property article, Article X., as it provides that the contractors may not "*withhold possession* from the Imperial Russian authorities of the ship," etc, as hereinbefore provided. This shows that it is a mere *option* upon the part of the Russian Government to assume control of the ship as against the Cramp Company should it wish to do so. But the point made by the respondent is that the Russian Government had *never done so*, and that *nothing had been done* to make this ship a *Russian ship of war* under the treaty; that it never *actually* had been *incorporated into the Russian navy as a*

Russian ship of war, and that at the time of the alleged desertion it was the ship of the Cramp Company, both in law and in fact. In law, because this contract should be construed to give only an *option* to the Russian Government to take possession and to maintain its right of property against the Cramp Company; and in fact, because the ship was always in the *actual custody and control* of the *Cramp Company*. But it is submitted that no matter how this contract is regarded as between the Cramp Company and the Russian Government, that cannot affect the question whether under this treaty it was, at the time of the desertion, a Russian ship of war. The question is one of *status* which *is not determinable by the contract*. It is a *status in fact* and the facts are, that the *ship had not been then*, and might never have become, a Russian ship of war, but was merely a ship which was being constructed under a contract with the Russian Government, and which had not then been "*delivered*" by the contractors *into* the Russian Navy.

But the circumstance that *Russia might reject the ship is*, it is contended, conclusive of the question. The kind of ships which the treaty was intended to protect is ships which are *Russian beyond any question* and *without any conditions* at the time of the desertion and the proceedings on *habeas corpus*. This ship might or might not be accepted by the Russian Government. Suppose it were not accepted, could it be contended that it had *ever* formed a part of the Russian navy, that it had ever been a Russian ship of war? And yet, should the District Court have remanded the appellee to await the requisition of the Russian authorities as a *deserter of the crew of the Russian cruiser "Variag,"* the Russian Government might subsequently, by rejecting this ship, have prevented it from ever becoming a Russian cruiser. Could it *then* be said that this man had ever been a part of the crew of the Russian ship "Variag?" His position then would have been that the Court would have declared him to be a deserter from the Russian ship "Variag," but in fact there would never have been such a Russian ship.

It is contended that this circumstance, that the ship might have been rejected, quite settles the matter, as it was not and might never have been a Russian ship of war, and hence it is not within the treaty. Article I. shows that the contracting parties themselves did not consider the thing under construction a Russian ship of war until it should be a "commissioned ship."

What the Treaty means is an actual Russian ship of war, actually commissioned as a part of the Russian navy, and actually and regularly manned by a Russian crew, and about whose status there can be no question.

c. Petitioner insists that the "Variag" was, under the contract, owned by Russia, and that ownership alone determines national character. It is not easy to understand, to say the least, how it can be said that Russia owns a ship which it may never accept. Certainly there is, at the best, no such unconditional ownership as is discussed in every case in which ownership is claimed to determine national character.

In the first place, by a process of exclusion, it is argued that because the ship could not meet the requirements of the law as to American registry, she must be Russian. This is a *non sequitur*. She may not have either character. A vessel may have no national character, as, for instance, a pirate. U. S. *v.* Pirates, 5 Wheat., 199. She may not have complied with our laws and may not be an American vessel and yet be a vessel of no other country, because she has not complied with the laws of any country. The only case which petitioner cites as authority for the proposition that the ownership of the vessel determines her national character is United States *v.* Jenkins, Fed. Cases, No. 15,473, also reported in 2 Law Rep. 146. If the petitioner had proceeded one page further in the report of the case in the volume of Federal cases cited, he would have hesitated to cite the case, for he would have found that on a final determination of the case *exactly the reverse* of the proposition for which he contends, *was decided* by the Court. The phase of the case which the petitioner cites was not the last phase which the case assumed.

There are two branches of this case, the first of which is reporded in Fed.Cases, No. 15,473, and the second in Fed. Cases' No. 15,473, A, immediately following the former report. The first branch of the case is not well considered, the opinion being merely a charge to the jury.

The trial Judge (BETTS, J.) records, that a decision of a Rhode Island court is opposed to his view. But in any event he lays down no such wide principle as appellant contends for. The question was whether because the ship in the case had not duly complied with the statutes as to license, the statutes covering revolts on board American ships could apply. The Court did not say that ownership determines national character for all cases and in all relations, but merely "within the interpretation of these laws;" *i. e.*, the criminal statutes in question.

The second branch of the case was a motion in arrest of the judgment on the verdict of the jury against the defendants, and the Court *in banc* disapproved the opinion of the trial Judge, and judgment was accordingly arrested on the ground that the ship in question was *not an American ship, notwithstanding the fact of its ownership by Americans*, and the Court cited as its precedent for this action a similar case decided by Judge STORY, in the Circuit Court of Rhode Island, United States *v.* Rodgers, Fed. Cases, No. 16,189, in which it was also held that *American ownership does not make the vessel American* and that the vessel must comply with the statutes as to registration and license in accordance with the law before it can have a status as an American ship. The only case, therefore, cited by the petitioner as authority that the national character is determined by ownership turns out to be a case *holding exactly the reverse.*

Justice JOHNSON'S dictum in U. S. *v.* Pirates (*supra*), relied on by Judge BETTS, is very cautious and is decidedly in favor of the respondent's position that the "Variag" was not a Russian ship of war at the time in question. Ownership was of value to decide questions under the criminal statutes, but, says Justice JOHNSON, "The laws that require such documents

(*i. e.*, the registry or documentary papers which establish national character) to be on board a vessel, have relation to financial, commercial or **international objects.**"

Is not the question in this case one having "relation to international objects?" Besides, says Justice JOHNSON, "character is a matter *in pais*." The "*in pais*" of this case is that there was not the slightest circumstance to show the Russian character of this ship, and it might never have assumed a Russian character.

The commission, the flag actually raised, and the circumstances, and not ownership, determine national character. Illustrations are found in cases which consider what are enemy ships in time of war. Thus a vessel only owned in part by an enemy may be hostile property; this demonstrates that property does not determine national character; otherwise, the neutral portion would be exempt. The case of the Industry Spinks, 56, may be taken as typical of these cases, many of which were cited by the petitioner in his brief as appellant in the Circuit of Appeals, but which seem now to be abandoned by him; they show, not that ownership determines national character, as petitioner contended, but that it is decided by something quite different. The Industry was a case of a claim by a Dane for one-fourth of a ship which was captured sailing under the Russian flag (the enemy's flag), the other three-fourths being owned in Russia. The prize court quoting LORD STOWELL's opinion in the "Vrow Elizabeth," 5 C., Rob. 4, said: "I hold the claim to be against the established rules of law, by which it has been decided that a vessel sailing under the **colors and pass** of a nation is to be considered as clothed with the national character of that country." This is held similarly in the "El Telegrafo," Newb., 386, the Court, quoting Wheaton's Internat. Law, 390. That the flag and pass, and not property, are the controlling tests is seen also in the case of "The Stephen Hart," Blatchf., Pr. 413; the "Belvidere," 90 Fed., Rep. 109; the "Amalia," 3 Fed. Rep., 653, which are not cases of enemy property, but cases where jurisdiction over ships sailing under

foreign flags was the question, hold also that the flag is the important test. In the case of the "Benitio Estenger," 176 U. S., 568, Chief Justice FULLER laid down a clear principle as to how the question of enemy character is determined.

He says: "that **political status determines** the question of enemy ownership. And by the law of prize, property engaged in any illegal intercouse with the enemy is declared enemy property, whether belonging to an ally or citizen, as the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences." Here the principle does not seem to be a question of ownership, but whether the prize property is "engaged in any illegal intercourse" with the enemy. It is the illegal traffic, not ownership. The case is important here also as showing the necessity of a *complete* and unconditional transfer of a ship before it can claim international rights growing out of such transfer. See the opinion at page 578.

The use of an enemy's flag is a mark and token of her real ownership. Desty on Shipping and Admiralty, Sec. 416; "The Haile Jackson" Blatchf. Pr., 42; "The William Bagaley," 5th Wall., 410; "The Success," 1 Dods., 132; "Fortuna," *ibid.* 81; "The Success," *ibid.* 132.

The ship's papers are conclusive of the national character of the ship as against the claimants. Desty, 416, citing the United States *v* Bartlett, 2 Ware 16; the "Santissima Trinidad," 7 Wheat., 283. See also for a fine discussion of these points, Hall on International Law (4th ed.), 167, where a public vessel of the State is defined to be a ship of war, government ships not armed as vessels of war, yachts, transports or store-ships, or vessels temporarily employed, whether as transports or otherwise, provided they are used for public purposes only, "that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his State, and that they satisfy other conditions which may be required by that law. The character of a vessel professing to be public is usually evidenced by a flag and pendant which she carries, and, if nec-

essary, by firing a gun." On page 169 of the same book, the author says: "But there are occasions when a vessel changes, or affects to change, her character while within foreign territory. Upon these, other considerations must be brought to bear than those upon which the rules are founded. The vessel is bought, or she is built and fitted out to order, as a piece of mere merchandise; she is only private property owned by the State which has acquired her." In the absence of an actual commission and an unequivocal assumption of the foreign character by the ship "though invested with minor privileges, she is far, if she be a ship of war, from enjoying the full advantages of a public character." It is contended, therefore, that the question whether the ship was a Russian ship of war, is determinable not by any one provision of the contract between the parties, but by the facts of the case, and the facts are, so far as the evidence goes, that, at the time of the desertion, there was no Russian crew in charge of the ship, or a Russian captain in command, that the Russian flag had not been raised, and the ship had not been commissioned, and all these things might never have happened, if the ship had been rejected.

See this rule stated in Hall on International Law, Section 44, pages 170-171. This question ought to be considered as settled, as all the Judges who have considered the case, including even the dissenting Judge, agreed that as far as the treaty is concerded, the "Variag" was not such a ship of war as would come within these provisions.

(*d*) It follows logically that if there was no Russian ship, there was no Russian crew. A similar point which is really so plain as to need no authority was decided by Judge STORY in U. S. *v.* Rogers, Fed. Cases, No. 16,189 (cited above) where he said:

"My opinion, therefore, is that this ship, cannot be deemed an American ship, within the sense of the 3rd section of the Statute of 1835 (C. 40) on which this indictment is founded; and the crew are not the crew of such an American ship or vessel as are contemplated by the act."

II. Can the Russian government cause the arrest of this man as a deserter from the *crew of a particular ship*, under an extradition treaty and then claim him on a different ground, *i. e.*, as a deserter from the Russian Naval Service, which the treaty does not cover? The Supreme Court has answered this question with an emphatic negative in U. S. *v.* Rauscher, 119 U. S., 407. In that case it is held that the man is only to be held for the extraditable offence and cannot be held for any other offence whatever, and that the mere fact that the foreign government has obtained *custody* of the man, by charging the extraditable offence, gives it no right to retain the man for some other offence. Is that not this case? Petitioner finding that he cannot succeed under the treaty, asserts a principle laid down in some cases that on *habeas corpus* the court will dispose of the man to the person entitled to his custody. That may or may not be true always, but it is certainly not true in extradition cases under the principle of *In re* Rauscher. Otherwise, how easy it would be for a foreign government to set up an unwarranted proceeding under some extradition treaty against, say, a much desired political offender who had fled to our asylum and then having caused his arrest and procured his commitment unwarrantedly, as in this and many other cases, claim him on general "custody" grounds, if he invokes *habeas corpus* for his relief. The principle of the above case also holds that a treaty necessarily implies a change in the law (See opinion of DALLAS J., below); and it becomes the definite agreement of the contracting parties, superseding any vague rights which might have been claimed theretofore under general international law. This was plainly recognized by the Russian government in proceeding under the treaty, and its election to proceed should preclude it from asserting any vague right which it may have had before the adoption of the treaty in respect of the immunity of vessels and crews from local jurisdiction.

In re Rauscher is of the greatest importance, and must be maintained in all its strength, or the most dangerous

consequences will ensue as to the rights of political refugees and as to the extent of our sovereign jurisdiction, and as to the limits of our treaty obligations.

III. Were the essential requirements of the treaty fulfilled by the petitioner as to proof?

It is contended that they were not, for the reason that there was no proof "by the exhibition of the registers, the rolls of the crews or by other official documents, that such individuals formed part of the crews."

The extreme importance of these requirements is shown by the fact that it is not only insisted on by the treaty (Art. IX. Treaty of 1832), but also by the section of the Revised Statutes which provides the machinery for carrying into effect the treaty. Revised Statutes 5,280.

It is clear that this provision of the Revised Statutes must be read into, and in connection with the treaty with Russia. Fong *v.* United States, No. 149 U. S., 698.

The petitioner makes much of the fact "that the District Court declared in its opinion that the proceedings before the Commissioner were formally regular." (Petitioner's Brief, p. 6), apparently contending that the District Court meant that the proper evidence had been submitted, whereas, the District Court, as is perfectly clear from the opinion of the District Judge, meant no more than that the forms and technicalities of procedure had been complied with. It is submitted, that this requirement of the treaty and the Revised Statute as to a particular kind of proof is not a form, but a matter of substance of the most essential character, for the District Judge points out (Rec., fol. 34) "that the kind of proof required by the treaty to prove the status has not been offered," and this neither before the Commissioner nor to the Judge himself.

In this connection, some alleged admissions which the petitioner claims were made by cousel for Alexandroff should be considered by the court. It is stated in petitioner's brief

(p. 13) "that there is an admission that the proceedings have been in accordance with the treaty and the Revised Statutes" (p. 16, Rec., and Opinion, p. 31, Rec.) Counsel for Alexandroff made no such admission as that stated to have been made on p. 16, of the Record; they simply did not *object* to Mr. Adler's offer of evidence "to show that the proceedings have been in accordance with the treaty and the Revised Statutes." Counsel did not intend to and did not admit that this evidence did or did not prove that the proceedings had been in accordance with the treaty and the Revised Statutes, but *simply made no objection to the offer* of such evidence, leaving the *effect* of the evidence to the court. Counsel for Alexandroff explicitly denied (fol. 17 Rec.) that Alexandroff came here as a part of the crew of the *Variag*; admitting that Alexandroff was a deserter from the **Russian Naval Service**, it was distinctly *not admitted* that he was a deserter from *the crew of the Variag*. The whole point in the case is, was there such a crew identified with a particular ship that it could be said that the respondent formed part of that crew? The wisdom of this provision in the treaty, requiring the exhibition of the register of the vessel, or roll of the crew, or other official document, to prove that the alleged deserter formed part of the crew, is shown in this case.

Here no such documentary proof was produced, because *none could be produced, there being no register of the vessel or roll of the crew, because there was no Russian vessel and no crew.* This provision is essential to the success of the proceeding before the United States Commissioner; and the circumstance that it does not affirmatively appear in the commitment and in the return to the *habeas corpus* that this essential provision of the treaty was fulfilled, renders the commitment nugatory, for the prisoner would be held without any warrant of law.

That such is the effect of a failure of this character is ruled in Nash's case, 4th Barn. and Ald. 49.

In that case a man was convicted of a certain crime

under an English statute which called for a certain kind of testimony as proof of the crime. On *habeas corpus* the return did not show that such proof had been produced before the committing magistrate, and the Court therefore held that the imprisonment was on its face illegal and without warrant of law, because to convict required a special kind of proof, and as it did not appear on the record that this had been presented, there was no justification for the imprisonment. The present case is precisely the same, but stronger, for here it was proved *dehors* the commitment that there could have been no roll of the crew, because there was neither ship nor crew.

Under the Nash case, the time to produce the documentary proof prescribed by the statute was before the United States Commissioner, but the proof was not produced either before the Commissioner or before the Court below.

IV. Considerable emphasis is laid by counsel for petitioner in their brief on certain technical rules pertaining to *habeas corpus* practice, and on pages 7 and 8 of their brief they cite a number of cases, which, they contend, conclusively determine this case, the most important of which is Ornelas *v.* Ruiz, 161 United States, 502. At the outset, it is to be noted that although in the District Court not a single technical objection of any character was raised by the Russian authorities, they now insist upon every possible minute technical objection which can be wrested out of the case.

a. The authority for issuing a writ of *habeas corpus* in such a case as this is Section 753 Rev. Stat., which provides that the courts have power to issue the writ whenever a person is in custody in violation of a treaty. The purpose of the writ is to "make an inquiry into the cause of restraint of liberty." (Rev. Stat., Sec. 752. See also opinion of Judge DALLAS below, Record, p. 41.) It thus appears that the writ was properly issued and the inquiry properly made.

b. Objection was made that, there having been no for-

mal traverse or reply to the commitment, it stands uncontradicted. It is obvious, therefore, that it is necessary to consider, First, What does the commitment state? Second, Was a formal reply to it necessary?

1st. An examination of the return and the commitment (Record, p. 3, which the Court is earnestly requested to read at length) shows that the keeper of the Philadelphia County Prison, on the return, stated that he held the man in custody by virtue of a commitment, of which he annexed a copy. That commitment shows only two facts of any importance whatever, to wit, that the marshal is commanded "to deliver into the custody of the said keeper the body of Leo Alexandroff, *charged* on oath before Henry R. Edmunds, United States Commissioner, with desertion from the Imperial Russian cruiser 'Variag,'" and that the prisoner was "*apprehended* upon my warrant, issued at the request of the Vice-Consul of Russia, at Philadelphia, upon the complaint of the captain of said cruiser 'Variag,' in accordance with the terms of the treaty between the United States and Russia and with the Act of Congress in such case made and provided." The rest of the commitment consists of a command to the keeper to receive Alexandroff into his custody in the prison and keep him, subject to the order of the Vice-Consul or of the master of the cruiser "Variag," or until he shall be discharged by due course of law.

It thus appears that the prisoner was simply *charged* and *apprehended*. It nowhere appears that there was any examination, such as the revised statute calls for.

The point as to the non-exhibition of the roll or register is made above. It is an unheard of thing, that, where the court provides for an examination, a prisoner should be committed without such examination.

What could the relator have traversed in this commitment? Absolutely nothing,—for we admit that he was charged on oath, by the affidavit of the captain, and that he was apprehended, and that he was placed in the custody of the keeper of the prison.

If the commitment had stated that an exhibition of the register or roll had been made, and an examination had been had, and that the facts necessary under the treaty and the revised statute had been found to be true (which is the requirement of the treaty and the revised statute), the relator would have had something to traverse, and it could then have been urged with some reason that a failure to traverse is equivalent to an admission, although, as will be shown below, a formal traverse was unnecessary. But a fact not alleged cannot be traversed. On the face of it, the commitment is bad and defective in vital particulars.

2d. But the relator, in his petition for the *habeas corpus*, says, under oath, that he was held illegally, and further states that he never deserted the "Variag," and that he never set foot on the "Variag" as a seamen thereof, and the commitment does not deny these facts; furthermore, to make assurance doubly sure, evidence was produced before the District Court to show that the whole proceeding was illegal and unwarranted, and that it could by no possibility be legal or warranted, because there was no ship and no crew, and hence no relation of captain and seaman. That is to say, it was shown that the Commissioner's Court had no jurisdiction either of the person of Leo Alexandroff or the subject matter of the offence with which he was charged, and this, under all the authorities, including Ornelas *v.* Ruiz, and all the authorities cited in the brief for petitioner, is a fact which may be inquired into by the court issuing the *habeas corpus*, for without jurisdiction the proceedings are void.

This evidence was not contradicted, although, as it appears from the record, the alleged captain of the "Variag" was in Court, and could have been called to testify.

Inasmuch as it never appeared that an examination had been had or any evidence offered, it is hard to see why relator is compelled to prove the nature of an examination which, as far as the record goes, never took place. But, on the contrary, the Russian authorities in the lower Court did offer presumably all the evidence at their command to show

what were the proceedings before the Commissioner, and that consisted of the "original affidavit and letter from the imperial Russian Vice-Consul to the Commissioner who committed this defendant, and upon which the warrant was issued," also "affidavit of Captain Behr and letter accompanying same." (See Record, pp. 15–16.)

Although there be no formal traverse or denial of the return to the *habeas corpus* in the manner required by law (3 Rev. Stat. 5 Ed. 889, Sec. 64) evidence to contradict the return is nevertheless admissible if no objection is made at the time that no traverse has been interposed. *People* v. *Sheriff*, 46 Barb. (N. Y.) 619. This objection was raised in the case after the case had been removed on *certiorari* to the Appellate Court, although no objection was made in the lower Court. The Appellate Court said:

"The evidence was admitted without objection as to its character. The objection was levelled at the right of the Judge to go back of the execution. No objection was made that no traverse was interposed and therefore the return was conclusive and could not be contradicted. Was a technical irregularity which could and would have been immediately obviated if objection had been made. The evidence was record evidence and conclusive in its character. The evidence having been offered and considered by the Judge and his decision rendered thereon without objection, it is now too late for the defendant to raise the objection. Order of discharge affirmed."

See *Seary* v. *Seymour*, cited above. This is an important case, showing that where these technical objections as to raising the issue on the *habeas corpus* are not made in the court in which the hearing took place, it is too late to make them afterwards and the court considers them waived It is further submitted that setting aside all technical objections, the gist of the inquiry is whether there could possibly be any evidence before the commissioner on which to commit. It is contended on behalf of Alexandroff, and shown by all the evidence adduced, as well as by the admitted facts,

that there could not be a Russian ship, and that he could not possibly be a member of the crew.

Under these circumstances, it is not requisite for a Court to inquire whether there was sufficient evidence before the commissioner, since it is apparent and palpable that no evidence could have been produced in the very nature of the case. This question is considered in United States *v.* Fowkes, 49 Fed. Rep., 50, affirmed by the Circuit Court of Appeals in 53 Fed. Rep., 13. There, an indictment had been found against a resident of the Eastern District of Pennsylvania by a Federal Court of Missouri, and the defendant had been committed in Pennsylvania by a commissioner to await removal to Missouri. On *habeas corpus* issued by the District Court in Pennsylvania, the return showed the indictment in Missouri, which the District Attorney contended was sufficient to justify his detention. In answer to this, the prisoner's counsel represented certain facts to the Court to show that it was impossible that the crime should have been committed by the prisoner, alleging that he never had been in Missouri. The Court heard evidence to sustain these points and the relator was discharged, the Court holding, that the question whether the Court should inquire no further than the indictment, was in the Court's discretion.

"There can be no doubt of its authority to make such inquiry. Where there is cause to believe the detention improper, the Court may, and should, inquire further. Under ordinary circumstances, an indictment is treated as sufficient. Here, however, the circumstances are extraordinary. * * * The undisputed testimony before me seems at least to justify belief not only that he did not, but also that he could not, commit the offence charged in Missouri, or, indeed, elsewhere."

The Judge then proceeds to speak of the danger to the individual's liberty to hold otherwise: "Here matters of form and considerations, based on notions of comity between courts, have no proper place in trials on *habeas corpus*. In the case of U. S. *v.* Rogers, 23 Fed. Rep.

658, and *In re* Buell, 3 Dill, 116, the Court went behind the indictment to ascertain whether an offence had been commited within the jurisdiction where it was found, as therein charged, and numerous similar cases might be cited. In *In re Nohr, supra* (73 Ala., 508); Hartman *v.* Aveline 63 Ind., 144; Wilcox *v.* Nolze *supra* (34 Ohio, 520), and Jones *v.* Leonard, *supra* (50 Iowa, 106), the court went behind the governor's hearing and warrant of extradition, and inquired whether there was evidence to show that the crime charged had been committed, where the indictment (on which the warrant issued) was found as averred. The court will not, of course, hear the relator's defense and try the case; it requires simply to be satisfied that there is evidence on which a jury may convict. In the case before me there is no evidence whatever on which a jury should proceed, notwithstanding the fact that the circumstances shown call for its production if any exist."

This case has been frequently approved in many districts. Similar decisions have been made in *In re*, Martin, 5 Blatchf., 303; *ex parte*, Hacker, 73 Fed. Rep., 464; U. S. *v.* Patterson, 29 Fed. Rep., 775 at 778, BRADLEY, J.

The case of *ex parte*, Farley, 40 Fed. Rep., 66, cited in brief for the petitioner, page 8, gives this rule as to what the "jurisdiction" of the committing court means: "Jurisdiction in the court means jurisdiction over the place, the person and the thing or subject matter. That there may be a subject matter there must be an act that is a crime, and this act must be properly and legally presented to the Court. See Syllabus, prepared by the Court in this case." *In re*, Lawler, 40 Fed. Rep., 233, the Court speaks of the conclusiveness of the commitment as to all the facts therein cited, for it had been neither demurred to nor denied "nor in any wise put at issue."

In the present case, the commitment sets up no facts, and it certainly cannot be denied that the facts said to be *charged* in the commitment were in some wise put at issue by the relator below by the allegations he made in his petition, as

well as by the proceedings at the hearing. Where the prisoner had been convicted in the court of the United States on a capital or infamous crime upon information without an indictment, he was discharged upon *habeas corpus* proceedings. *Ex parte*, Wilson, 114 U. S., 417.

It is therefore submitted that:

First.—The commitment did not present any facts that could have been traversed.

Second.—That no *formal* traverse was necessary even if it had presented facts.

Third.—That a substantial traverse was made by the introduction of evidence, which was not contradicted, and by the petition of the relator.

Fourth.—That when it appears, as it does here, that by no possibility could the offence have been committed or the evidence requisite to establish it adduced, the Court will waive all formalities and go to the core of the issue.

V. Had the District Court jurisdiction? The odd contention is made by the petitioner that under Article VIII. of the Treaty of 1832, the Russian Vice-Consul at Philadelphia alone had jurisdiction to determine this matter. There are in the way of the success of this contention several important considerations. It is perfectly obvious that the United States never intended to permit a foreign consul to construe treaties, or to determine such questions as arise in this case. The absurdity of permitting a Russian Vice-Consul to pass upon the rights of the alleged deserter would be at once apparent. His decision would in every instance be in favor of his own country and he might so stretch a treaty as to bind the United States by something to which it had never assented. The kind of questions over which the consul is

to have jurisdiction cannot be other than minor questions in which the United States has no immediate interest.

Wildenhus' case, 120 U. S., 11, contains a discussion of this question in the case of a similar treaty, and it is laid down, "If that (the act) is of a character to awaken public interest, when it becomes known, it is a 'disorder,' the nature of which is to affect the community at large and consequently to invoke the power of the local government where the people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community and to create, in the language of the treaty, a disorder which will 'disturbed tranquillity and public order on shore or in port.'" If, as in this case, a crime committed between the decks of a foreign ship by one member of the crew upon another was such a question as the local Courts had jurisdiction of as against the consul on account of the public clamor (which seems to be the only reason), surely the present case was properly before the District Court, where the men lived on shore, where the alleged desertion took place on shore right in the country, and where the question is, what agreement has the United States made with Russia in the Treaty? The foreign consul might fairly be expected to punish the criminal, and the necessity of local intervention is not clearly seen in such a case as the Wildenhus case, but that the Russian consul would do justice, in a case like the present one, where the interests of his nation are overwhelmingly one way cannot be reasonably expected, and it would be derogatory of the international dignity of the United States, were it to permit the foreign consul to pass upon its rights under a treaty made with his government.

But the question is set at rest by the very provision of the treaty itself, for it distinctly says that the vice-consul shall have jurisdiction without the "Interference of the local authorities, **unless—the said consul, vice-consul or commercial agents should require their assistance** to cause their decision to be carried into effect and supported." This is precisely

such a case. Application was made by the representative of Russia to the local authorities in the person of the United States Commissioner, thereupon the "interference of the local authorities" began, and it could not end until the matter was determined in accordance with the local law or treaty; for the courts of the United States have power to issue writs of *habeas corpus* whenever a person is in custody in violation of a treaty. Rev. Stat., Sec. 753.

VI. Opposing counsel seem to give a great deal of importance to the letters presented to the Supreme Court under the title of "Correspondence with State Department and Treasury Department," to submit which, on April 25, 1901, on motion of Mr. F. R. Coudert, Jr., of counsel for petitioner, leave was granted by your Honorable Court.

It is to be borne in mind that at the hearing in the District Court, there was only one letter introduced in evidence, said letter purporting to come from the Treasury Department, without an adressee, and signed O. L. Spaulding, Acting Secretary U. S. (page 17, Record). No other correspondence was then introduced, nor was it intimated that any other correspondence was had upon the subject. Yet, the correspondence printed in separate pamphlet contains, as regards this letter, the name of the addressee, and also a number of other letters introduced, as was said before, by leave of the Supreme Court. In other words, new evidence is introduced by the petitioner upon a *certiorari* from the Circuit Court of Appeals in reference to a matter originally heard in the District Court. It is contended, that this introduction of evidence at such a late stage of the proceedings is illegal, and, furthermore, it does not lie within the discretion of the Appellate Court to grant leave to introduce new evidence at this time. See 2 Foster's Federal Practice, 3rd ed., page 850, where it is said that no new evidence can be offered upon such an appeal, except such evidence as was offered and excluded in the court below. The case of Seavey *v.* Sey-

mour, 3 Cliff., 439, and cited by Foster, it is submitted, effectually disposes of the question of new evidence. It is said in that case, "Power to re-examine the decree of the District Court is all the power in such a case which is possessed by the Circuit Court; and such re-examination must be made upon the same evidence as that introduced in the District Court, except in cases where competent evidence was offered and excluded which should have been admitted. Errors of the District Court may be corrected; but it was not the intention of Congress in providing for an appeal, to give the party a new trial, unless the same should be ordered by the Appellate Court for some error committed by the District Court."

To allow this correspondence to be offered in evidence now, would be subversive of the most elementary principles of law.

The attention of the court, in this connection, is particularly called to the fact that the leave of Court to submit the correspondence was asked for in the absence of, and without notice to counsel for the respondent, and that it was not until the fifth day of November, 1901, that counsel for the respondent discovered that such a motion was ever made on behalf of the petitioner.

Exterritoriality.

VII. The question of exterritoriality has been raised in this case, and it is claimed that the intended crew of the unfinished cruiser "Variag" was immune from the jurisdiction of the local courts. Great stress has been laid upon the case of the Exchange, 7 Cranch,. 117, without giving due consideration to the obvious distinctions between the facts of that case and the one at issue. And before entering into a discussion of the particular rules laid down by Chief Justice Marshall in the Exchange case, it may be well to note that the Brief for Petitioner confounds exterritoriality with consular jurisdic-

tion under a treaty (see pages 4 and 5 of Brief for Petitioner), and thus make their argument upon entirely mistaken premises. They seem to assume that consular jurisdiction can exist absolutely *dehors* the local jurisdiction. In other words, instead of consular jurisdiction being a matter of courtesy extended, or favor granted, by the local authorities, it is assumed to be an original jurisdiction with which the local courts dare not interfere. The Consul seems to be placed upon a pedestal not to be reached by the local courts. This is certainly an erroneous view. The principles of the cases cited on page 5 of Brief for Petitioner are opposed to the view which counsel evidently intend to demonstrate by them. In the Wildenhus case, 120 U. S., 12, jurisdiction was taken by the local courts. In the Belgenland case, Mr. Justice BRADLEY distinctly lays down the rule, citing numerous decisions, that the local court has jurisdiction even in a case where the subject matter of dispute arises between two foreign vessels on the high seas, and the Court there decides, that when a controversy in admiralty betweeen foreign vessels in the courts of the United States arises under the common law of nations, the court below should take jurisdiction, unless special grounds are shown why it should not do so.

Mr. Justice BRADLEY, in delivering the opinion of the Court, says: "Although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arrising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. See 2 Parsons Ship. and Adm., 226, and cases cited in notes. In the case of "The Jerusalem," 2 Gall., 191, decided by Mr. Justice STORY, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte,

and it did not appear that it was intended that the vessel should come to the United States." 114 U. S. 365-366.

The principles of exterritoriality are born of considerations partly of courtesy and partly of convenience. It is a cession of right inherent in the local State to the foreigner, under certain circumstances, but not an inherent right in the foreigner as against the right of the State, where the dispute arises. To regard exterritoriality otherwise, would be to permit an interference by a foreigner with the rights of sovereignty by the local State, and every State is too jealous of its sovereignty that such permission should ever be thought of without an express convention on the part of the State ceding its right. The authorities on international law and the many decisions in the United States courts would seem to emphasize the fact that first and foremost the local jurisdiction attaches to everything within its territory; and only in exceptional instances does a State relinquish its right to impose its jurisdiction upon property and subjects of another State coming within its territory.

As to the Exchange case, it is to be borne in mind that there was an actual ship, sailing under the flag of a foreign nation in amity with the United States, having a thorough and complete organization on board of her, under the command of a captain duly commissioned by his sovereign and in every particular being a ship of France in a port of the United States. The French government did not put in an appearance in the local courts of justice, but maintained its sovereignty throughout, invoking the aid of the President through the Secretary of State in its behalf. The Attorney-General appeared with the suggestion on behalf of the Executive, thus presenting to the court a question based upon international relations between two friendly powers where the foreigner refused to submit to the jurisdiction of the local court. In other words, the nature of that case was purely diplomatic, the foreign government never for an instant voluntarily waiving any particle of its sovereignty to the local authorities. It is submitted, therefore, that there being in that case an actual

ship with an organized crew, flying her country's flag and refusing to submit to the jurisdiction of the local courts, claiming its right of sovereignty through the diplomatic channels, it cannot be a case in which the local jurisdiction would attach as it would and should in this case, where there was no ship, no organization on board of her, no crew and no flag and was still in the possession of a ship building company, which was at the time of the alleged desertion a citizen of the United States, and particularly, where the foreign government does invoke the jurisdiction of the local court, thus placing itself in the position of a suitor, instead of that of a sovereign.

The decision of Chief Justice MARSHALL in the Exchange case, it is contended, would have been different, if the jurisdiction of the local court had been invoked by the representative of the foreign sovereign, or even if the representative of the foreign sovereign would have entered an appearance in a suit against him. See Mighel *v.* Sultan of Johore, 1 Q. B., 147, where LOPES, L. J., says that "the only way in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ." See also King of Portugal *v.* Russell, 31 L. J. Ch., 34.

The matter is set at rest in the opinion of the Court in the Sanitissimo Trinidad, 7 Wheaton, 283, which was the next case of importance to the Exchange case, bearing upon the question of sovereignty, and which explains the rules laid down in the Exchange case by Chief Justice MARSHALL; and the Court's attention is particularly called to pages 352 *et seq.* Judge MARSHALL seems to have had the above expressed thought in mind when, in the concluding paragraph of his opinion in the Exchange case, he says: "If this opinion be correct, there seems to be a *necessity* for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States."

But the question is further settled by the well established principle that, however much a sovereign is exempt from the jurisdiction of another State, if he "appeals to the courts of a foreign State, or accepts their jurisdiction, he brings with him

no privileges that can displace the practice as applying to other suitors." Hall on International Law, Sec. 49, Note, citing the King of Spain *v.* Hullet; 1 Clark and Finelly, H. of L., 333; the "New Battle," L. R. 10, p. 33; Calvo, Sec. 549.

Another consideration to be urged upon the attention of the Court is that, whatever might be the exemption or immunity of a ship of war while its crew is on board ship, the case assumes an entirely different aspect when the crew mingles with the general populace at a place of stoppage. Even the opinion of the Attorney General cited in the brief for the] petitioner (p. 5,) recognizes this principle. On page 122, vol 7, Attorney General's opinion, it is said: "From all these premises, the consequences are inevitable in regard to the prisoners on board the "Sitka." So long as they remained on board that ship they were in the territory and jurisdiction of her sovereign. There, the neutral has no right to meddle with them. If, indeed. they be landed, then they pass from the jurisdiction of the belligerent to that of the neutral." It is, therefore, suggested that the question is to be decided as to the location of the subject matter in dispute. That principle is borne out by the "Santissima Trinidad" as well as in other cases.

The body of Alexandroff was taken, as admitted in the Record, in New York, where he pursued the vocation of a drug store clerk; he having previously declared his intentions to become a citizen of the United States.

Could the decision in the Exchange case possibly apply to the case at issue? Can it be said that sailors detached from their ship, no matter how, are to be immuned from all jurisdiction of the local courts, or that we are taking jurisdiction against the right of a foreign sovereign, when he himself causes the warrant to be issued? It surely cannot be said that the letter of the Assistant Secretary of the Treasury had such a bearing upon the case as to give the detail of men allowed to land exemption from all legal prosecution. The Exchange does not decide that. In fact, by analyzing the

decision of Chief Justice MARSHALL, we are brought to the conclusion that everything laid down in that opinion, beyond the question of a foreign ship of war in a port of the United States, is mere dictum, for the decision in that case was based upon the facts of the case, and the facts, as has been shown above, were such that no local jurisdiction could possibly attach.

Even if it should be admitted that there is a custom in reference to ships, as Judge GRAY says in his opinion, "by reason of their vagrant character," to hold them immune, while in a port of the United States, from the local jurisdiction, and even assuming that that custom has become a law, there is obviously no such custom in regard to the coming and going of troops. There is no law or custom under which soldiers and sailors of one country enjoy exterritoriality in another country.

Under the authorities, it is submitted, the law is exactly the reverse. In countries like Turkey or China, which concede exterritoriality to foreigners, the question would be of slight importance; but in countries which boast of the supremacy of the law, and in which the principle of territorial soverignity prevails, the case is very different. Besides that, in the case of the Exchange, a man-of-war was held to be exempt from the territorial jurisdiction of another country. This principle has not been held to be applicable to soldiers and sailors. (See in this connection Moore on International Arbitrations, Vol. 5, p. 4925, *et seq.*) It has been shown above, that the present case would not come under the decisison of the Exchange unless it be under the third or fourth rule laid down in that case.

That the "Variag" is not a national ship of war has been shown above, and therefore it cannot be immuned on that score, nor can the alleged crew, being on land, have any immunity. In this respect, the court is respectfully referred to Hall on International Law. (4th ed., §55.)

"The immunities of a vessel of war belong to her as a complete instrument, made up of a vessel and crew, and intended to be used by the State for specific purposes; the

elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew, she is merely property; if members of her crew go outside the ship or her tenders or beats they are liable in every respect to the territorial jurisdiction. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his state. Possessing his ship, in which he is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the jurisdiction of the country, and if he does so voluntarily, he may fairly be expected to take the consequences of his act."

VIII. What is the effect of the Assistant Secretary's letter, (p. 17, Record), upon the sovereignity of the United States over the men mentioned in the letter? It is well, that this point be considered with the immediately preceding point of sovereignity. If any claim can be made at all by the Russian authorities on the grounds of sovereignity, it must be by reason of this letter; yet, no matter what violent construction should be put upon that letter, no such waiver of sovereignty as is claimed through it, can be gathered from its four corners.

1st. It should be remembered that the letter is addressed to no one, but is presumed by Judge BRADFORD to have been sent to the Russian Ambassador. Grant this, and the question still remains, how can this letter, coming, as it does, from the Secretary of the Treasury, waive the sovereignty of the United States?

All matters pertaining to diplomatic and international relations must necessarily go through the proper executive department, to wit, the Department of State. That is to say, if exemption from the jurisdiction of the United States were intended to be asked for by the Russian authorities and conveyed through the medium of the letter in question, special

permission would, in that event, be given by the President through the Secretary of State; because the President may act through the proper department in any matter pertaining to the business of that department. The treasury department has never been regarded as the proper department for the purpose of conferring such an important thing as exemption and immunity from local jurisdiction.

The cases in which permission has been given to foreign governments to pass their troops through our territory are collected in Wharton's Digest Int. Law, Sec. 13, p. 41, and in every case, the permission was given by the Secretary of State. The permission to go across the country or be stationed there has always been clear and unequivocal. When the President acts through the *proper* department, there is a presumption of his authority if the act be, as Mr. Cushing, Attorney General, said (7 Op. Atty. Gen., 453), "within the lawful jurisdiction of such head of department." Every case cited by Mr. Cushing in that opinion was a case in which the proper department acted, and the authority of the President was therefore presumed. See, similarly, Runkle *v.* United States, 122 U. S., 543.

Now, while the President may act through the treasury department, yet when he does so, it is to be presumed that he is acting with respect to some measure of which the treasury department has jurisdiction, and the possible fair consideration of this letter is that the letter intended merely to waive the head tax and examination required of immigrants, since immigration is a matter which falls within the jurisdiction of the treasury department.

If such important privileges were to be extended as the stationing of several hundred men on our soil as an organized armed body, free from the control of our laws for an indefinite length of time, (as the petitioner must necessarily contend), it is strange, indeed, that such a matter was not conducted by the Secretary of State. The Russian authorities evidently recognize the force of this argument, for in the correspondence submitted by leave of Court it appears that since the

argument in the Circuit Court of Appeals, where this question first became important, the Russian government has addressed correspondence on the subject in question to the State Department, but by what possible construction it can be contended that the United States recognized any organization among these men is hard to see.

It is submitted, therefore, that the letter must be read according to its plain tenor. That the submitted correspondence has no place before this Court, and the Court is referred to the opinions of Judges DALLAS and GRAY in this connection. Reference is also made to Sec. 202 Rev. Stat., stating what are the proper duties of the Secretary of State, and Sec. 248 establishes the duties of the Secretary of Treasury, which are summed up as follows: "And generally (he) shall perform all such services relative to the finances as he shall be directed to perform them."

IX. In reference to the suggestion filed in the Circuit Court of Appeals by the District Attorney, it is to be noted that no such paper appeared in the District Court. Nor is there any precedent for the acceptance of such a suggestion in an appellate court after the parties have submitted to the jurisdiction of the court below and while they continue to submit thereto. The suggestion by the Attorney General in the Exchange case, as it has already been pointed out, was a matter of necessity, since the question could not possibly have been raised without the intervention of the State Department through the District Attorney, as the French Government did not appear in court; but what necessity was there for the suggestion of the Attorney for the United States in the case at issue? Has not the Russian government appeared as a suitor, represented by private counsel, and invoking the jurisdiction of the local Court? It is nothing less than anomalous to have a suitor declare his dignity as a sovereign after he has invoked the jurisdiction of the local Court as an ordinary litigant.

Apart from that, the intrinsic value of the suggestion is

such that it cannot help the petitioner in his difficulty. It discloses no facts but those which appear in the record of the case, and, as was said by Judge DALLAS (page 42 Record), "It is not, in our opinion, well founded in law," and "the legal effect of those facts is for the determination exclusively by the Court;" and Judge GRAY says (Record, p. 46): "The interpretation of the record in this case is the function of the Court and not of the Executive, and the suggestion is in this respect irrelevant."

It is submitted, therefore, that the suggestion is entitled to no weight.

In this connection, the Court is respectfully requested to note the various changes of method adopted in bringing this case to the attention of the various courts. In the District Court, the Russian authorities, admitting the jurisdiction of the local courts by submitting thereto, based their rights upon the treaty and the contract between the Russian Government and the shipbuilders. When that was shown to be untenable, they came into the Circuit Court of Appeals and brought up the question of comity, without giving any evidence of a waiver of sovereignty by the United States, or that there was any organization, or that the captain was entitled to the custody of Alexandroff. Failing there, they now come to the highest court of the land and endeavor to prove their sovereignty by letters written subsequently to the arrest and months after the discharge of the prisoner by the District Court, and in reference to the introduction of which there was no notice given to the other side, and which letters do not even contain the name of Leo Alexandroff, the relator in the court below.

CITIZENSHIP.

X. The Revised Statutes, Section 5280, provide that, if on examination, the facts are found to be true, the deserter shall be delivered up to the foreign consul, unless he is a citizen of the United States. In this case, petitioner has declared

his intention of becoming a citizen of the United States. This provision of the Revised Statutes, which provides the machinery for the operation of such treaties, as the one in hand, must be read into and in connection with the Treaty with Russia. See Fong *v.* U. S., 149, U. S., 698. And it is contended, that if a citizen of the United States will not be delivered up for deportation to the foreign country, neither will a man who has declared his intention of becoming a citizen. It is clearly the intent of the Revised Statutes that the United States shall not lend its aid to a foreign government to deport American citizens. In this connection the Court is respectfully referred to the peculiar state of affairs between Russia and the United States with regard to the American naturalization of Russian subjects. In a number of cases reported in the Official Reports of Foreign Relations of the United States, it appears, that it is a crime under Russian laws for a man to become a citizen of another country, or to attempt to do so without the consent of the Russian authorities. There have been a number of cases in which Russian subjects came to the United States, were regularly naturalized, and while travelling abroad as American citizens in Russia were arrested and punished for breach of the Russian Statutes referred to. The United States has protested again and again against these punishments upon the ground that these men are American citizens, and their crime consists merely in obeying the American law.

See particularly the cases of John Ginzberg in the Reports of the Foreign Relations of the United States for 1895, Part II, page 1081 ; also the case of Anton Yablowsky, *id.*, 1096, *E. Seq.* See also the conclusion of the case of John Ginzberg, reported in the Foreign Relations of the United States for 1897, at page 435, of which Mr. Breckinridge said: "Our citizens of Russian origin, unless with Russia's consent, expose themselves to the gravest hardship by returning to the empire." Mr. Sherman, Secretary of State, in reply to this, said, "The views of the United States and Russia are apparently irreconcilable." See page 440, where Article 325 of

the Russian Penal Code is given as follows: "Whoever absenting himself from the fatherland enters into the service of a foreign power without the permission of the government, or becomes the subject of a foreign power is liable for this violation of his duty and oath of fidelity, to the loss of all his civil rights and perpetual banishment from the Empire; or, if afterwards, he returns voluntarily to Russia, to deportation to Siberia." Even the children of such subjects born here are considered as Russian subjects and amenable to the penalties of this cruel law. While it is true that petitioner has merely declared his intention and is not yet a citizen, still even such persons have some rights. (See Webster on Citizenship.) Particularly would this be the case where the man is within the jurisdiction of the United States. It is clear, that if Russia had this man in her possession and jurisdiction, the United States could not protect him, because of his declaration of intention, especially when the Russian government denies the right of the United States even to protect naturalized citizens. The question is generally determined by the circumstances, which power has *jurisdiction and control over the man.* And as the United States has control over the man in this case, it is respectfully contended that it is proper for the Court, there being this conflict between the Russian law and the American, to determine the issue in favor of the American law and give the petitioner the opportunity of completing the citizenship which he has declared his intention of acquiring. No nation is bound to respect the law of another nation, when those laws conflict with its sovereign will and policy. Story on Conflict of Laws, §25 and 22. At least, if the Court cannot interpret the Revised Statute in the way contended for, the circumstance of the liability of the prisoner to the outrageous penalties of the Russian law for the crime of becoming an American citizen, should be of considerable weight in determining the other question in this cause. And, if there be any doubt as to the status of this ship, it should be resolved in favor of the liberty of the petitioner, and not in favor of a

government whose policy is so diametrically opposed to ours. But it is contended, that the spirit of the revised statutes is in accordance with the construction contended for, and the statute means that the United States will not assist in the extradition of men *over whom it has acquired rights.*

Consideration of Judge Bradford's Dissent.

XI. In conclusion it is proper to consider the opinion of the dissenting Judge, inasmuch as all the other Judges agree in almost every particular. Judge Bradford assumes (Record, p. 48) that Alexandroff came to this country in a body under military discipline. This fact is not proved. The men came on an Atlantic liner and lived on shore, as anybody else would live, although it is true they lived together. Now, the only facts with respect to any military organization are to the effect that the force was to be organized as a crew some time in the future, *i. e.*, when, and if, the Russian Government should accept the ship. There is not the slightest proof that the United States Government expected them to come in as an organized body, or that they were to be organized on shore, or as a matter of fact, that they were organized on shore, or that anybody interested in the matter ever supposed that they would be organized, except some time in the future and then only upon the acceptance of the ship. He lays stress on the fact, (Record p. 50) "that they were here in the employ of their sovereign for strictly national objects and duties." It is to be observed that this circumstance alone would not make them exempt from the local jurisdiction, because foreigners, singly or in groups, may come to this country from another country for national objects and duties who would not be considered beyond the local jurisdiction. They must be an organized military force with full local permission. He assumes, again, that Behr commanded the naval detail on shore. There is no doubt

that he was intended to be the captain of the ship when, and if, that should be accepted, but there is not a particle of evidence that he had the command or custody of these men on shore. Again, Judge BRADFORD assumes too much in his consideration of the letter from the Assistant Secretary of the Treasury, but the discussion of this has been made above. He finds an implication in the letter that the detail, *qua* detail, should in that character remain on our soil and have a right of passage over it, that is, indefinitely ; and thus a mere innocent courtesy in the waiver of small fees is stretched, by implication, to be an agreement that an army of several hundred men should remain on our soil for years, or as long as they please. The learned Judge makes much of the necessity of disregarding formalities (Record, p. 53), ignoring the fact that disregarding these "formalities" would divest the United States of its sovereign jurisdiction, place a foreign army on its soil for an indefinite time, and above local control, and deny the right of asylum to a man forced into naval service by a foreign country. The learned Judge gives the suggestion a most powerful effect, but that subject has been considered above. He then assumes that Captain Behr is entitled to the custody of Alexandroff, and hence should be awarded the custody again on the *habeas corpus*. It is clear, that Alexandroff was not in Behr's custody at the time he was arrested. It is true, the writ named Behr as a respondent, but this only because the Commissioner erroneously named him in the commitment. *Habeas corpus* is only directed to the person having the body. (§ 7, 55 Rev. Stat. ; Seavey *v.* Seymour, 3 Cliff., 439 at 454.) The position of Behr is, therefore, that of a man who is claiming the right as an intervenor such as he probably would have claimed had he not been formally named in the writ. In the latter case there would have been no doubt that his position would have been that of an officer of a foreign navy demanding the extradition of a deserter from a foreign *navy*, and not from a particular *ship*, which extradition is never accorded by the United States.

It is respectfully suggested, that the flaw of the learned Judge's opinion is that he assumes too much without requiring the legal proof from which alone a Judge may draw his conclusions.

Conclusion.

XII. It is, therefore, submitted that Alexandroff was never a member of an organized body to be entitled to the name of "crew;" that he was arrested and held without warrant of law; that neither before nor after his arrest was he in the custody of Captain Behr; that he was not a deserter from a Russian man-of-war; that his desertion did not come within the purview of the treaty of 1832; that there being no Russian ship and no organized crew, there could be no exemption from the local jurisdiction under the general International law; that, if such an exemption would be applicable, the Russian authorities could not avail themselves thereof, after they became suitors in a local Court, and invoked the "interference of the local authorities;" that the letter of the Secretary of the Treasury did not and could not confer immunity from the local law upon the Russian authorities; that Alexandroff is entitled, by reason of his declaration of intention to become a citizen of the United States, to the protection of the laws of the United States; and that under all the circumstances of the case, the judgment of the Court below should be affirmed.

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WM. R. TUCKER, VICE-CONSUL, ETC.,

vs.

THE UNITED STATES EX REL. LEO ALEXANDROFF.

SUPPLEMENTAL MEMORANDUM OF AUTHORITIES FOR RESPONDENT.

1st. That the treaty in question is an extradition treaty, see Bouvier's Law Dictionary, "Extradition." After giving the definition of "Extradition," which fully covers this case, it cites instances of extradition treaties, mentioning, among others, treaties for the return of deserting seamen, and specifically mentions the treaty with Russia as one of these. Anderson's Law Dictionary is to the same effect. Sec. 5280, Revised Statutes, which provides for the machinery for carrying the treaty of 1832 into effect, is included in the Revised Statutes, under the title "Extradition."

2d. Upon the question of defects in the commitment in an extradition cause, justifying the discharge on *habeas corpus*, see *Ex parte* Van Hoben, 4th Dillon, 411.

3d. Upon the questions of substantial traverse of the commitment, see United States *vs.* Wyngall, 5th Hill (N. Y.), which holds that the ground of discharge is in the nature of an ordinary replication to the return on *habeas corpus*, and will be so considered by the court.

4th. That the court may hear evidence to determine the jurisdiction of the commissioner, see *in re* Cuddy, 131 U. S., 280. In U. S. *vs.* Jenkins, 2 Wallace, Jr., 521, Federal courts went behind an indictment so as to do justice in the case, which was a *habeas corpus* proceeding.

See also Cosgrove *vs.* Winney, 174 U. S., affirming *In re* Rauscher.

Respectfully submitted.

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